IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION Nos 28 & 29 of 1992
IN
COMPANY PETITION No. 10 of 1981
WITH
COMPANY APPLICATION No 382 of 2002
IN
COMPANY APPLICATION No 28 of 1992
IN
COMPANY PETITION No. 10 of 1981

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

O.L OF SINHA WATCHES(I)P.LTD.

Versus

INDIAN OVERSEAS BANK

Appearance:

1. COMPANY APPLICATION No. 28 & 29 of 1992
MR NS SHEVADE for Petitioner No. 1
MR AC GANDHI for Respondent No. 1
MR RD DAVE for Respondent No. 2-3
MS PJ DAVAWALA for Respondent No. 4
2. COMPANY APPLICATION No. 29 of 1992
MR NS SHEVADE for Petitioner No. 1
MR AC GANDHI for Respondent No. 1

3. COMPANY APPLICATION No 382 of 2002
MR NS SHEVADE for Petitioner No. 1
MR AC GANDHI for Respondent No. 1.

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 04/08/2004

COMMON ORAL JUDGEMENT

All these Company Applications are in respect of the same subject matter and since the parties are also common in all the three applications, the same are being disposed of by this common judgment and order.

2. Company Application No. 28 of 1992 is filed by the Official Liquidator as a Liquidator of Sinha Watches (India) Private Limited (in liquidation) seeking direction to the respondent, namely, Indian Overseas Bank to pay restore and hand over to the Official Liquidator a sum of Rs. 28,01,047.10ps. (S.Fr. 535000) realised by the respondent from the Company and/or its Directors which was credited on 16.08.1986.

3. Company Application No. 29 of 1992 is also filed by the Official Liquidator as Liquidator of Sinha Watches (India) Private Limited (in liquidation) seeking direction from this Court to the respondent, namely, Indian Overseas Bank to pay, restore and hand over to the Official Liquidator a sum of Rs. 4,04,886.51ps. realised by the respondent from the Company and/or its Directors, which was credited on 08.09.1986, 18.09.1987 and 15.06.1987.

4. Company Application No. 382 of 2002 is also filed by the Official Liquidator as Liquidator of Sinha Watches (India) Private Limited (in liquidation) seeking direction from this Court to the respondent, namely, Indian Overseas Bank to furnish/produce the details of Execution proceedings taken out by respondent Bank in Court at Switzerland and details of accounts of Mr. Sushil Kumar Sinha, Managing Director of the Company (In Liqn.) from which various balances were recovered by order dated 07.05.1985 during the pendency of Civil Suit No. 2023 of 1981.

5. As far as Company Application No. 28 of 1992 is concerned, an affidavit in support of Judges Summons was filed by the Liquidator wherein it is stated that Indian Overseas Bank had filed Company Application No. 105 of

1981 in Company Petition No. 10 of 1981 seeking permission of this Court to commence and proceed with the intending suit to be filed against the Company (In liquidation) and others in the City Civil Court, Ahmedabad and thereafter, Summary Suit No. 2023 of 1981 was filed against the Company and four others for recovery of an amount of Rs.53,12,588.41. It is further submitted that in the said suit, a pursis/statement was filed by the Bank on 01.02.1989 stating that during the pendency of the suit, the Bank has received a sum of Rs.32,05,932.61ps. as per particulars mentioned therein. It is further stated that on 16.08.1986, the account has been credited by recovery of S.Fr. 535000 at 19.10 received through Union Bank of Switzerland amounting to Rs. 28,01,047.10ps. and has also given particulars of recovery made thereafter. The Bank has not informed the Official Liquidator about the proceedings initiated by the Bank against the Company and/or its Directors in the Swiss Court. The Bank has also filed another pursis on 16.07.1991 in the pending suit before the City Civil Court, Ahmedabad giving bifurcation of the amounts against liabilities of the Company and/or its Directors. The Liquidator has further submitted in the said affidavit that the Bank is an unsecured Creditor and hence, it has no right or authority to appropriate, adjust or have custody of the said sum realised from the Company or its Directors towards its dues.

6. An affidavit-in-reply was filed by the Bank on 15.06.1992 along with which a pursis filed before the City Civil Court, Ahmedabad in the pending suit No. 2023 of 1981 giving particulars of the amount received by the Bank, was also attached. In the said Affidavit-in-reply, it was made clear by the Bank that the Bank has recovered the amount from the Guarantor personally and the said amount did not belong to the Company. It was also made clear that the Official Liquidator was not entitled to recover back the said amount from the Bank. It was also clarified that the amount recovered by the Bank from the Guarantor
was ordered to be given due credit and the liability of the Company would be reduced accordingly.

7. Mr. N.S. Shevade, learned advocate appearing for O.L. has submitted that the Bank has not taken any permission of this Court to file any proceedings against the Company in liquidation and its Directors in any other Court. The Bank has not informed the O.L. before taking any action against the Company in liquidation and its Directors in the Court of Switzerland. The Bank has also not given any specific details and particulars regarding

the proceedings filed by it against the Directors in the Court of Switzerland. He has further submitted that the facility of letter of credit was obtained by the Company in liquidation and the amount was fraudulently transferred by the Managing Director to the various accounts in Swiss Bank. The amounts lying in those accounts were seized pursuant to the orders passed by the Court of Switzerland and the said amount was recovered by the respondent Bank which undisputedly belonged to the Company and hence, the said amount is required to be restored to the O.L.

8. Mr. A.C. Gandhi, learned advocate appearing for the Bank has submitted that the Bank had lodged criminal complaint against Mr. Sushil Kumar Sinha at Switzerland and had also filed Civil proceedings against him at Switzerland. The orders passed by the Courts in Switzerland are already placed on the record of this Court. He has invited the attention of the Court against the proceedings initiated in the Court of the District of Brugg by the Bank against Mr. Sushil Kumar Sinha leveling the charge against him of fraud and continued and qualified forgery of documents. It was stated therein that the accused has, in the intention to enrich himself or third persons, by fraudulent representation or concealment of facts misled somebody and has exploited the error of said person and by this way determined the person to an attitude, by which the person caused a pecuniary loss to herself or a third person. It was further stated that by means of these fraudulent machinations the said Mr. Sushil Kumar Sinha has succeeded to get letter of credit of an approximate value of S. Fr. 1,170,000/- to the detriment of the Indian Overseas Bank, Madras, India. It was also alleged that the accused transferred the sums of money to various banks in Switzerland and abroad and during the criminal proceedings, various amounts of totally approximately S. Fr. 600,000/- were attached and on this basis, the prayer was made for punishment of the said Mr. Sushil Kumar Sinha and for confiscation of all seized assets and for transfer of the same to the injured party, after deduction of the penalty and the costs of the proceedings.

9. The District Court, Brugg has passed the order on 07.05.1985 whereby the said Mr. Sushil Kumar Sinha was held guilty of fraud and forgery of documents and the remaining amount, after deduction of the amount of penalty and all costs of proceedings, was ordered to be transferred by the Court cashier to the civil plaintiff.

10. An appeal was preferred against the order of the District Court, in the High Court of Canton of Aargau and the said appeal was dismissed on 04.09.1986. The said order was further carried in appeal before the Swiss Federal Court and the order of the High Court was confirmed by the Swiss Federal Court. Mr. Gandhi has, therefore, submitted that the amount which was transferred by the Swiss Court is the amount seized and recovered by the Swiss Court from Mr. Sushilkumar Sinha and it did not belong to the Company and hence, the O.L. is not entitled to pray for restoration of the said amount.

11. As far as Company Application No. 29 of 1992 is concerned, Mr. Gandhi has submitted that amount of Rs. 4,04,886.51ps. is also recovered by the Bank from the Guarantor personally and the said amount did not belong to the Company. A pursis which was filed before the City Civil Court at Ahmedabad on 01.02.1989 makes it clear that this amount forms part of the amount of Rs. 32,05,932.61ps. This amount was also seized and transferred pursuant to the order passed by the Swiss Court. Even otherwise, this amount was also recovered by the Bank in the form of S. Fr. on 18.03.1987 and 15.06.1987 and the said facts were clearly indicated in the pursis dated 01.02.1989. In this view of the matter, this application is also required to be rejected.

12. So far as Company Application No. 382 of 2002 is concerned, Mr. A.C. Gandhi has submitted that the Bank has filed detailed affidavit on 23.04.2004 along with which the following documents were placed on record.

(A) Copy of plaint of Summary Suit No. 2023 of 1981 filed by the Bank against Sinha Watches (India) Private Limited and others in the City Civil Court at Ahmedabad.

(B) Copy of the written statement filed by the defendant Nos.2 & 3 in the said Suit being Exh. 64.

(C) Copy of the written statement filed by the defendant No.5 G.S.F.C. in the said suit being Exh. 160.

(D) Copy of the judgment passed by the Ahmedabad City Civil Court in the said suit dated 25.05.1992

(E) Copy of the order passed by this Court in Company Application No. 105 of 1981 granting leave under

Section 446 of the Companies Act, 1956 on 21.07.1981.

13. It was also made clear in the said Affidavit that the Bank had already supplied the copy of the orders passed in the said proceedings filed by the Bank at Switzerland to the O.L. by Bank's Regd. A.D. letter dated 03.04.1987. The copies of the judgment delivered by the Switzerland Court and the Appellate authorities have already been filed in the proceedings of Company Application Nos. 28 and 29 of 1992. On the basis of the above details, Mr. Gandhi has submitted that the prayer made in Company Application No. 382 of 2002 has been substantially complied with and it does not survive now.

14. After having heard learned advocates appearing for the respective parties and after having perused the entire record of the case and copies of the record of the City Civil Court, Ahmedabad in Summary Suit No. 2023 of 1981 as well as the copies of the record of the proceedings before the Swiss Court including the District Court, Appellate Court and the Federal Court and the orders passed therein, the Court is of the view that the amount recovered by the Bank does not belong to the Company nor the said amount has been recovered from the accounts of the Company. The findings given by the Swiss Court specifically indicate that the amount has been fraudulently transferred by the Managing Director to the accounts of the various firms in Switzerland and those accounts have been seized by the Courts. The amount was transferred from these accounts and not from the account of the Company. Even otherwise, the City Civil Court, Ahmedabad has passed the decree against the Company as well as the Guarantors and the amount recovered from the Swiss Bank were to be adjusted against the decretal amount which is to be paid by the Guarantors as well. The O.L. has failed to establish or to lead any evidence to the effect that the amount has been recovered by the Bank from the Company's account. The Official Liquidator can assume the jurisdiction or is empowered to call back the amount only if it belongs to the Company. Since the Court is of the view that the amount which is recovered by the Bank does not belong to the Company and it is not recovered from the account of the Company, there is no question of giving any direction to the Bank to restore the said amount to the Official Liquidator. Since the prayer made in Company Application No. 29 of 1992 for restoration of the amount of Rs. 4,04,886.51ps. stands also on the same footing as that of Company Application No. 28 of 1992 wherein the claim for the amount of Rs. 28,01,047.10ps. has been made which figure was taken on

the basis of the pursis filed before the City Civil Court and in the same pursis, the reference with regard to an amount of Rs. 4,04,886.51ps. was also given. Since all these amounts were recovered by the Bank from the accounts of the Swiss Bank of the Managing Director and/or his concerns, pursuant to the orders passed by the Swiss Court, the said amount cannot be ordered to be paid or restored to the Official Liquidator.

15. In the above view of the matters, both these Company Application Nos. 28 & 29 of 1992 are rejected. Since due compliance of the prayer of Company Application No. 382 of 2002 is already made, the same becomes infructuous and accordingly, all the three applications are disposed of without any order as to costs.

[K.A. PUJ, J.]

#Savariya#

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